

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-2097

To be argued by
DIANA FELDMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-2097

NGAMAN WILCOX,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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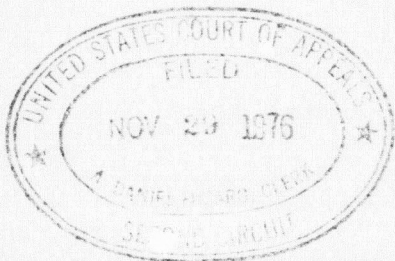


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-2097

NORMAN WILCOX,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from an order of the District Court (Newman, *J.*) denying Wilcox's motion for reconsideration under Fed. R. Civ. P. 60(b). Wilcox and four co-defendants were convicted in the District of Connecticut on September 14, 1972, of federal bank robbery charges [18 U.S.C. §§ 2113(a), (b), (d), and 2(a) (b)].

Wilcox and Richard Jenkins were sentenced to eighteen years and Donald Hall to eight years in prison. Lynn Ellen Morrow was sentenced to the custody of the Attorney General for the period of her minority.¹ Their convic-

¹ The District Court granted co-defendant James C. Bailey, Jr.'s post-conviction motion for a directed judgment of acquittal.

tions were affirmed on April 5, 1974, *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974)², and *certiorari* was denied on February 18, 1975, 420 U.S. 925 (1975).

On April 17, 1975, Wilcox, later joined by his co-defendants, filed *pro se* petitions for relief pursuant to 28 U.S.C. § 2255 on the ground that their rights under the Sixth Amendment and Rule 43 Fed. R. Crim. P. were violated in that they were absent from the courtroom during pre-trial suppression hearings without personally having waived their right to be present. These motions were denied by written opinion on August 5, 1975, without hearing. On December 22, 1975, Wilcox's motion for reconsideration under Fed. R. Civ. P. 60(b) was denied. A Notice of Appeal from the December order was filed on February 9, 1976.

Questions Presented

- I. Whether the District Court clearly abused its discretion in denying Appellant's Motion for Relief under Rule 60(b);
- II. Assuming *arguendo* that this Court will review the dismissal of Appellant's Section 2255 motion, whether the District Court was required to hold an evidentiary hearing where no material fact necessary for decision was in dispute;
- III. Assuming *arguendo* that this Court will review the dismissal of Appellant's Section 2255 motion, whether the District Court erred in holding that

² Morrow's judgment of conviction was remanded to the District Court in order that its form could be made to comply with the Juvenile Delinquency Act, 18 U.S.C. § 5034.

defense counsel, for reasons of trial strategy, may waive his client's right to be present during pre-trial suppression hearings.

Statement of Facts

The facts underlying Appellant's convictions for bank robbery are summarized in the appellate decision affirming the convictions, *United States v. Jenkins, supra*, and will be discussed only as relevant to the instant appeal.

On March 12, 1973, the District Court heard arguments on motions to dismiss the indictment and began to take evidence on pre-trial suppression motions. Each defendant was represented by separate, court-appointed counsel throughout the suppression hearings, which continued on March 13, 16, 26 and 30, and April 10.

At the conclusion of the argument on the motion to dismiss on March 12, 1973, the Court asked defense counsel if they wished to have their clients present in the courtroom for the suppression hearings. At that time all defendants were in the Marshal's lockup in the courthouse, except for Hall, who was free on bond. Attorney Clifford, Hall's counsel, responded in the negative. Other counsel made no response (Tr. 3/12/73 p. 13).

Upon the commencement of the afternoon session that same day, the Court advised defense counsel of a request by the Marshal's Office to return those defendants in custody to their cells if their presence were not required in court. Attorney Clifford indicated that he did not want his client to remain. Attorney Frankel, counsel for Wilcox, also stated that he did not require his client's presence (Tr. 3/12/73 p. 22-26). Attorney Oliver, counsel for Morrow, similarly declined to have his client

present. Attorney Sagarin, Jenkins' counsel, made no response.

With one exception, no defendant was again present in the building during the suppression hearings. The exception occurred on March 16, when Wilcox testified in his own behalf concerning events surrounding his arrest on October 15, 1972. (Tr. 3/16/73 p. 320-337). At his request Wilcox was permitted to remain in Court following his testimony (Tr. 3/16/73 p. 337).

The final three days of the suppression hearings, March 26, 30 and April 10, involved motions to suppress photographic identifications on the ground that the photo displays were suggestive. On the first of these days, the Assistant United States Attorney represented to the Court that each defense counsel had informed him that he did not want his client to be present. (Tr. 3/26/30 p. 3-4). The Court accepted counsel's decision after ascertaining that none of the photo identifications was made in the presence of any defendant.

Wilcox's § 2255 petition to the District Court contended that, although he was transferred to the courthouse for the purpose of pre-trial suppression hearings, he was unaware that the hearings were in progress until the first two days had been completed. Wilcox asserted that he immediately requested that he be present for the remainder of the proceedings,³ and that at no time did he waive a known right.⁴

³ Wilcox also claimed to have sent a letter to the Court requesting to be present. A search of the file did not reveal this letter.

⁴ Jenkins' petition alleged no specific details except a claim that he had specifically requested to be present at all stages of the proceedings. The petitions filed by Hall and Morrow alleged no details at all.

The Government countered these assertions by sworn affidavits from defense counsel Frankel and Oliver, Chief Deputy United States Marshal Dirienzo and Assistant United States Attorney Bowman, who prosecuted the case. Attorney Frankel stated that he conferred with Wilcox prior to the first suppression hearing and advised him not to be in the courtroom because of the importance of identification testimony and the likelihood that his presence in the courtroom would insure his identification by witnesses. Frankel also asserted that Wilcox did not request to be present until he elected to testify on March 16, and that had he made such a request, he would have been present (App.). Attorney Oliver's affidavit similarly stated that at his request his client was not present in the courtroom. Oliver further recalled at least two conversations by attorneys for all the other defendants to the effect that they did not want their clients present during the suppression hearings so that witnesses would not have an opportunity to observe their clients (App.). Attorney Sagarin, Jenkins' counsel, invoked the attorney-client privilege and declined to disclose his role in the proceedings. However, the affidavit of Marshal Dirienzo stated that Sagarin had advised him of his doubts that defense counsel would want the defendants present in the courtroom during the hearings (App.). Assistant United States Attorney Bowman stated in his affidavit that he informed defense counsel of his intention to ask for in-court identifications of their clients if the defendants were present in the courtroom. He also stated that he advised the court at the March 26 hearing to suppress photo identifications that all defense counsel had expressed their desire to have their clients absent during that hearing (App.).

The District Court ruled that a hearing was unnecessary since the material facts sufficient for a decision were not disputed. Concluding that the right to be present at

pre-trial suppression hearings was not a right so clearly personal that only an on-the-record statement by the defendant himself could suffice to waive it, the Court held that the record in this case clearly established that counsel waived their clients' right to be present as a matter of trial strategy, a tactical decision binding on their clients and not subject to collateral attack after the convictions.

ARGUMENT

POINT I

The District Court Did Not Abuse Its Discretion In Denying Wilcox's Rule 60(b) Motion.

- A. The only issue properly before this Court is whether the District Court clearly abused its discretion in denying Appellant's Rule 60(b) motion to reconsider its prior ruling.**

The rather tortuous procedural history of this appeal is as follows:

August 5, 1975 Denial of Sec. 2255 petition.

August 21, 1975 Thirty day extension of time within which to file Notice of Appeal granted.⁵

⁵ Fed. R. App. P. 4(a) allots sixty days within which to file a Notice of Appeal when the United States is a party to the action. Therefore, it appears that Wilcox would have had until October 4, 1975, without any extension. Wilcox in fact received the full sixty days to which he was entitled. No Notice of Appeal was filed within that period. Whether or not the District Court would have granted a further extension is speculation.

- August 25, 1975 Motion for reconsideration denied.⁶
- December 23, 1975 Motion for reconsideration under Fed. R. Civ. P. 60(b) denied.
- February 9, 1976 Notice of Appeal from order of December 22nd filed.
- March 8, 1976 Leave to appeal in forma pauperis granted.
- July 27, 1976 Government's motion to dismiss for failure to prosecute filed.
- September 14, 1976 Government's motion is granted unless Appellant files brief by October 14, 1976.

Wilcox did not file a Notice of Appeal from the District Court's denial of his Section 2255 petition within the time limits prescribed; indeed, he never filed such Notice at all. Instead, in December, 1975, four months after the decision on the merits, Wilcox filed a motion under Fed. R. Civ. P. 60(b) for reconsideration of the order denying his motion to vacate.⁷ The District Court denied that motion on

⁶ A motion for reconsideration of the correctness of a judgment is functionally a motion under Fed. R. Civ. P. 59(e). To be timely that motion must have been served within ten days of the entry of judgment. Judgment herein was entered on August 5, 1975. Wilcox's motion should have been served by August 16, 1975. His motion for reconsideration, dated August 20, 1975, thus was untimely and did not terminate the running of the time for appeal as set forth in Fed. R. App. P. 4(a). See 9. Moore's Federal Practice § 204.12[1] (2d Ed. 1975 Supp.). It might be noted, however, that a timely motion would have made no practical difference since Wilcox never filed a Notice of Appeal from the August 5, 1975, judgment.

⁷ Rule 60(b) permits the filing of a motion for relief from judgment or order within a "reasonable time" from such order or within one year if the reasons for the motion are mistake, newly discovered evidence or fraud of an adverse party.

December 22, 1975. Notice of Appeal from the December order denying the Rule 60(b) motion was filed on February 9, 1976.

Rule 60(b) permits the District Court to relieve a party from a final judgment for reasons of mistake, newly discovered evidence, fraud by an adverse party, a void judgment, satisfaction of judgment, or any reason justifying relief from operation of the judgment. It is well settled, however, that a Rule 60(b) motion, directed to the discretion of the District Court, is not a substitute for an appeal when appeal would have been the proper remedy, *Wagner v. United States*, 316 F.2d 871 (2d Cir. 1962), but permits extraordinary relief when justified by special circumstances. *Hoffman v. Celebrezze*, 405 F.2d 833 (8th Cir. 1969). Thus, a motion to reconsider made once the time to appeal from the original order has elapsed does not make the original order appealable, *Hines v. Seaboard Air Line Railroad Company*, 341 F.2d 229 (2d Cir. 1965).

Although an order denying relief under Rule 60(b) itself is appealable, the appeal brings up only the correctness of the order and not the underlying judgment. *Sampson v. Radio Corporation of America*, 434 F.2d 315 (2d Cir. 1970) *Wagner v. United States*, *supra*; 7 *J. Moore's Federal Practice*, F60.30[3] at 429-431 (2d Ed. 1975 Supp.) (hereinafter *Moore's Federal Practice*). Otherwise, a defeated litigant could circumvent time limitations for appeals merely by submitting a belated petition for reconsideration under Rule 60(b). *Cinerama, Inc. v. Sweet Music, SA*, 482 F.2d 66 (2d Cir. 1973) (dictum) (Friendly, J.) For these reasons, the only issue reviewed on an appeal from the denial of a Rule 60(b) motion is whether the District Court clearly abused its discretion in denying the motion. *Sampson v. Radio Corporation of America*, *supra*; *Hines v. Seaboard Air Line Railroad Co.*, *supra*.

These principles should fully apply to the instant case. The fact of self-representation is not a license for non-compliance with the relevant rules of procedural and substantive law. *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975). Wilcox clearly knew of the time limitations for filing a Notice of Appeal, since the August 21, 1975, order of the District Court stated that his Notice was due by October 4, 1975. Moreover, the filing of such Notice is not unduly onerous as it entails merely filing a statement with the clerk of the District Court specifying the parties taking the appeal, the order appealed from and the court to which the appeal is taken. Fed. R. App. P. 3. Since Wilcox's appeal is from the District Court's denial of his Rule 60(b) motion, the only issue properly before this Court is whether the District Court clearly abused its discretion in denying relief.

B. The District Court did not clearly abuse its discretion in denying the Rule 60(b) motion.

Wilcox's motion for relief under Rule 60(b) was based upon "facts in law" learned subsequent to the District Court's dismissal of his Section 2255 action. Specifically, Wilcox claimed that the court below erred both in concluding that he knowingly waived his right to be present and in rendering its decision without an evidentiary hearing; Wilcox also asserted without particularity that additional facts learned from co-defendants supported his position. The District Court's denial of the Rule 60(b) motion was entirely within its discretion.

Although Rule 60(b) permits the District Court to grant relief from a judgment for certain enumerated reasons, a Rule 60(b) motion is not a substitute for appeal or an indirect means of extending the time for appeal. *Cinerama, Inc. v. Sweet Music, SA, supra*; *Sampson*

v. *Radio Corporation of America*, 7 *Moore's Federal Practice*, F60.18[8] at 217. Rather, Rule 60(b) applies to exceptional situations justifying special relief after a judgment has become final. *Renieri v. News Syndicate Co.*, 385 F.2d 818, 822 (2d Cir. 1967); *Hoffman v. Celebrezze*, *supra*. Because Rule 60(b) is not a substitute for appeal, where the errors complained of are substantive errors of law, the "reasonable time" limitation for filing a Rule 60(b) motion has been construed to be co-extensive with the time allotted for an appeal.^{*} *Schildhaus v. Moe*, 335 F.2d 529 (2d Cir. 1964) (Friendly, J.); *Hoffman v. Celebrezze*, *supra*; *Gila River Ranch Inc. v. United States*, 368 F.2d 354 (9th Cir. 1966); 7 *Moore's Federal Practice*, 60.22[3] at 259. The "facts in law" raised by Appellant in his Rule 60(b) motion all are substantive arguments properly raised only on appeal challenging the correctness of the District Court's dismissal of the Section 2255 petition. Wilcox has demonstrated no exceptional circumstances justifying extraordinary relief under Rule 60(b) after the time for appeal has passed. Additionally, Wilcox's "new facts" remained totally unspecified, giving the District Court no reason to grant relief from the judgment on that ground. Since Wilcox's brief on appeal merely reiterates arguments relating to the propriety of the August 5, 1975, dismissal, there has been no showing of any special justification meriting relief under Rule 60(b). Consequently, the District Court's denial of that motion was not a clear abuse of discretion.

^{*} Two circuits, the First and Seventh, have held that an appellant cannot raise an error of law under Rule 60(b). *Silk v. Sandoval*, 435 F.2d 1266 (1st Cir.), *cert. denied sub nom. Silk v. Kleppe*, 402 U.S. 1012 (1971); *Swam v. United States*, 327 F.2d 431 (7th Cir.), *cert. denied*, 380 U.S. 852 (1964).

POINT II

Assuming *arguendo* that this Court will review the dismissal of Wilcox's Section 2255 motion, the District Court was not required to hold an evidentiary hearing where no material fact necessary for decision was in dispute.

Wilcox first argues that the District Court erred in dismissing his Section 2255 motion without conducting an evidentiary hearing. Specifically, Wilcox claims that the court below concluded that he had knowingly waived his right to be present at the pretrial hearings on the basis of *ex parte* affidavits submitted by the Government. These contentions reveal that Wilcox has misapprehended the thrust of the District Court's decision.

Wilcox's Section 2255 petition, unsupported by affidavit or other evidence, alleged that he did not knowingly relinquish or abandon his right to appear at the pretrial hearings. He also claimed that a letter was sent to the District Court on March 13, 1973, requesting a court appearance.⁹ The Government's response consisted of a memorandum of law and affidavits from participants which, *inter alia*, established counsels' tactical decision to have their clients absent from the courtroom during the suppression proceedings. Wilcox filed a reply memorandum challenging the Government's use of affidavits under this Court's decision in *Taylor v. United States*, 487 F.2d 307 (2d Cir. 1973). At no time did Wilcox dispute that counsel, as a matter of trial strategy, intended that he be absent to prevent an in-court identification. Instead Wil-

⁹ No evidence of a letter was offered other than Wilcox's claim; a search of the file maintained by the clerk for the District of Connecticut did not reveal any such letter.

cox in effect contended that only he could demonstrate such waiver by a personal on-the-record statement.

Judge Newman held that an attorney may, without prior consultation with his client, waive the client's right to be present at a pre-trial hearing not directly concerned with the determination of guilt. Because counsel's tactical strategy and intention to waive were not disputed by Wilcox and were clearly substantiated by the record, the Court found that an evidentiary hearing was not required.

Taylor v. United States, *supra*, does not require a different result. In *Taylor*, the court found error in a summary rejection of a petition for post conviction relief which was supported by a sufficient affidavit setting forth detailed facts which, if sustained, would require a new trial. However, since *Walker v. Johnson*, 312 U.S. 275, 284 (1941), if the facts necessary for decision are undisputed or incontrovertible, an evidentiary hearing is not required. See also, *Mixen v. United States*, 469 F.2d 203 (8th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973). Mere generalities or hearsay statements will not entitle an applicant to a hearing. *Dalli v. United States*, 491 F.2d 758 (2d Cir. 1974). Appellant's claim of entitlement to a hearing thus fails for two reasons: the petition was unsupported by affidavit or detailed evidence and it raised no material issues of fact necessary for decision. Where, as here, the motion papers and the files and records of the case conclusively show that Appellant was entitled to no relief, Section 2255 does not require a hearing. *Dalli v. United States*, *supra*; *United States v. Hester*, 489 F.2d 48 (8th Cir. 1973).

POINT III

The District Court did not err in denying Appellant's § 2255 motion where the record clearly demonstrated that defense counsel, for reasons of trial strategy, waived his client's right to be present during pre-trial suppression hearings and Appellant suffered no prejudice thereby.

Appellant claims that the conduct of pre-trial suppression hearings in his absence violated the Sixth Amendment and Fed. R. Crim. P. 43. Arguing in effect that only a personal on-the-record statement by a defendant himself could constitute a waiver, Wilcox asserts he was prejudiced by his absence at hearings held on March 12 and 13, 1973.¹⁰ In the factual context of this case, Wilcox's claims are without merit.

The Government does not dispute Wilcox's right to be present at pre-trial suppression hearings where evidence was taken. *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *United States v. Dalli*, *supra*. There is also no doubt, however, that the right to be present, even at trial, may be waived. *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972). The Government claims that, for tactical

¹⁰ A total of six hearings were held. The hearings of March 26, 30 and April 10 concerned photographic identifications made out of Wilcox's presence. Because Wilcox would have been unable to assist counsel concerning events occurring out of his presence, his absence from the courtroom during these three hearings would have constituted harmless error beyond a reasonable doubt. *Chapman v. United States*, *supra*. The District Court would have so held if it had been necessary to reach this question (App. at, n.6). Appellant was in court for the entire March 16 hearing. Thus the only hearings from which Wilcox was absent were those on March 12 and 13.

reasons, Wilcox's attorney chose to exclude his client from the courtroom and that this decision effectively waived Appellant's right to be present. Even if the waiver were ineffective, however, the facts of this case reveal that any error resulting from Appellant's absence was harmless beyond a reasonable doubt. *Chapman v. United States*, 386 U.S. 18, 21 (1967).

The instant case is unusual in that the record so clearly reveals that all defense counsel involved in this multi-defendant case intended that their clients be absent from the hearings in order to prevent in-court identifications by witnesses. (Tr. 3/12/73 pp. 13, 22-26; Tr. 3/26/73 pp. 3-4). It must also be noted that although Wilcox claims to have written to Judge Newman requesting to be present, a letter never found in the files, Wilcox at no time voiced any objection to his exclusion when he appeared at the suppression hearing on March 16, 1973,¹¹ or when the District Court rendered its written decision on the pretrial motions, or at trial, or on appeal. This inaction certainly undermines Wilcox's assertions that he became "greatly disturbed and dissatisfied" with counsel's representations once he learned that the hearings had commenced without him. Cf. *United States v. Tortora*, (2d Cir. 1972) (waiver of right to be present may be implied from defendant's conduct.) Indeed, counsel's fears of in-court identification were fully borne out when Appellant was identified by the Danbury Chief of Police at the March 16 hearing. While the preferred procedure might be to establish on the record a defendant's consent to his attorney's tactical trial decisions, *United States v. Crutcher*, 405 F.2d 239, 245 (2d Cir. 1968), *cert. denied*,

¹¹ Appellant's request to remain in court following his testimony was granted.

394 U.S. 908 (1969),¹² where as here, the exclusion was so clearly a considered choice by counsel for the benefit of his client, Wilcox should be bound by his attorney's decision. *Winters v. Cook*, 489 F.2d 174, 176 (5th Cir. 1973) (*en banc*); cf. *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965). Furthermore, the right to be present at a pre-trial suppression hearing has not been held to be within that group of rights so clearly personal that only an on-the-record statement by the defendant himself may effectively waive it. Compare *United States v. Crutcher*, *supra* (right to be present when jury empaneled); *Evans v. United States*, 284 F.2d 393 (6th Cir. 1964) (right to be present when trial judge gives additional instructions to jury), with *Winters v. Cook*, *supra*, (attorney may waive client's constitutional objection to racial composition of grand jury). See generally, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1111 n. 102. Appellant's reliance on *United States v. Clark*, a "hijacker profile" case,¹³ is inappropriate. In *Clark*, the Government moved to exclude the defendant from an entire pre-trial suppression hearing in order to protect the secrecy of the hijacker profile used to screen air travelers. This Court's holding that such exclusion was plain error resulted from factors totally lacking in the instant case: testimony given later at trial indicated that defendant's counsel may have been unaware of facts that

¹² *Crutcher*, however, involved impaneling of a jury, an event that is part of the trial itself and a right particularly mentioned in Rule 43. Arguably a defendant's absence from jury selection is inherently more prejudicial than absence from a suppression hearing.

¹³ See also *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973) (exclusion improper where suppression hearing also served as trial on the merits); *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972) (limited exclusion from hijacker testimony upheld).

could have led to a contrary resolution of the suppression motion; there were no compelling circumstances justifying the search in question; there was no convincing evidence of counsel's intent to waive appellant's right to be present; the defendant's silence *in absentia* could not be construed as knowing waiver. In the case at bar, the Government at no time sought to exclude Wilcox from the hearings. Rather, the Government produced Wilcox at the courthouse on March 12, 1973 and kept him there until defense counsel indicated that his presence was not required. Thus, it was clear that counsel did not want Wilcox present for tactical reasons benefitting his client. Furthermore, Wilcox voiced no objection to his exclusion when he did appear in court. Finally the search contested was fully justified by compelling circumstances and no facts later emerged which would have changed the outcome of the suppression hearing.

Wilcox's claim of prejudice emanates from his absence during the testimony of New Jersey State Trooper Fedorko, who arrested him after finding a concealed weapon in the saddlebag of his motorcycle. Subsequent investigation of Wilcox's money revealed several bills stolen from the Union Trust in Danbury.

Wilcox contends that he was severely prejudiced because he was unable to point out to his counsel that Trooper Fedorko erred as to the time that he stopped Wilcox on the highway and because he was unable to explore with counsel a possible "harassment of a biker" defense to the initial stop. Appellant also claims that he failed to cover one point in his own testimony about the sequence of events before the search as clearly as he would have had he been present during Fedorko's cross-examination, namely that he gave Fedorko a bill of sale for the motorcycle along with his license.

Judge Newman's memorandum of decision on Wilcox's suppression motion noted that there was "some variation as to the sequence of events between the testimony of Wilcox and the officer who made the search. . . . There is not even a consistent version in the testimony of the state trooper." Thus, the District Court was fully cognizant of the variations in Fedorko's testimony. There was no disagreement, however, that the bike upon which Wilcox was traveling had a cardboard license plate. Wilcox argues that, if present, he could have disputed Fedorko's testimony that he stopped Wilcox during the day. Moreover, Judge Newman evaluated the reasonableness of the stop as if it occurred at night, as Wilcox claims. Given the District Court's express notation of the inconsistencies in the trooper's testimony and resolution of the question of the time of the stop in Wilcox's favor, no prejudice resulted from Wilcox's absence from the courtroom. Wilcox's claim of a "harassment of a biker" defense is frivolous in light of the hand-lettered cardboard license plates on the motorcycle.

Finally, Appellant argues that as he was not present during the cross-examination of Trooper Fedorko, he was prejudiced by his inability to clarify his own testimony as to the sequence of events prior to the search. Wilcox claims that because he gave a bill of sale to the trooper along with a valid license, his lack of a registration certificate would not support a reasonable belief that the motorcycle was stolen, justifying the search. Wilcox rather disingenuously fails to inform this Court that his valid license was in the name of William Fuller, while the bill of sale was from a distributor to James C. Bailey. Thus, rather than lessening a reasonable belief that the motorcycle was stolen, Wilcox's production of the bill of sale heightened it, fully justifying the search. In short,

any error resulting from Wilcox's absence from the courtroom during the March 12, 13 suppression hearings was harmless beyond a reasonable doubt.¹⁴

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
for the District of Connecticut
 P.O. Box 1824
 New Haven, Connecticut

DIANA FELDMAN
Assistant United States Attorney
District of Connecticut

¹⁴ Appellant raises two other examples of prejudice which are meritless. First he argues that, since he was present at 42-A Virginia Avenue, Danbury, when law enforcement officials gained entrance to the premises, he would have disputed the voluntariness of Mrs. Gary's consent to enter the premises. This claim is frivolous since Mrs. Gary herself testified that she freely consented to the officials' looking anywhere they wanted. See *United States v. Jenkins, supra*, 496 F.2d at 72.

Appellant is also disingenuous in relating the facts regarding the search of Magnolia Hall's automobile, an event at which Wilcox was not present. Mrs. Hall was visiting her husband at the Charlotte, North Carolina police station when officials asked her for permission to search her car. She asked her husband for consent, which he gave, and then she signed a consent to search form. Wilcox claims that Hall would have disputed the voluntariness of her consent had he been present in court. Clearly Appellant has attempted to show prejudice by disputing every incident where any appellant was present, no matter how frivolous the claim.

APPENDIX

Appellant's Motion to Vacate

Pursuant to 28 U.S.C. § 2255

On March 10, 1973, your petitioner was transferred on a Writ of Habeas Corpus Ad Prosequendum to New Haven, Connecticut for the expressed purpose of having a hearing on his motion to suppress.

On March 12, 1973, the trial judge held a hearing in absence of your petitioner on the motion to suppress; although your petitioner was in the courthouse, he never left the cell room of the U. S. Marshal for a courtroom appearance in the matter.

On March 13, 1973, your petitioner again wasn't taken to court so he requested by letter for a court appearance and appeared on 16 March 1973.

On March 26, 30, and April 10, 1973, hearings were held again in the absence of your petitioner, on his motion to suppress identification testimony.

ARGUMENT

It is the contention of your petitioner that he was denied his right to be confronted with witnesses against him when the trial judge held pre-trial hearings on various motions to suppress, (Sixth Amendment, U.S. Constitution F.P.C. P. 43 U.S.C.A.) the sixth amendment guarantees that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, this rule extends and is applicable to hearings on Pre-Trial Motions to Suppress (*United States v. Clark*, 475 F.2d 240 (2d Cir.)). In this instant matter, your petitioner was transferred to Connecticut on a Writ of Habeas Corpus Ad Prosequendum for the expressed purpose of having a hearing on a Pre-Trial Motion to Suppress evidence and identification testimony, however,

Appellant's Motion to Vacate

your petitioner never left the confines of the U.S. Marshal's Office for a courtroom appearance in the matter. After your petitioner was advised by counsel that the hearings of March 12, and 13th, 1973 were held in petitioner's absence, he immediately requested that he be present for the remainder of the proceeding, but at this stage, there was very little your petitioner could do to effectively assist counsel in the presentation of his motion. At no time did your petitioner relinquish or abandon a known right, and his silence in absentia should not be construed as a waiver. Two points that were very prejudicial to your petitioner, inter-alia, because of his absence from the hearing was Trooper Fedorko's testimony as to his time of arrest of your petitioner, and the sequence of events leading to the seizure of a weapon from the Motorcycle's saddlebag.

1) Trooper Fedorko placed the time of arrest at 1:30 PM which was a time of very good daylight on that day for observation. The true time of arrest was 9:00 PM, a very poor time for observation as it was dark. Had your petitioner been present, he could have brought this discrepancy to the attention of counsel. It may well be that Trooper Federko found it necessary to lie about the time he observed the cardboard license plate to better persuade the court of his reason for stopping petitioner, otherwise, his ability to see in the dark may have become questionable. It was also possible that your petitioner could have explored with counsel the possibility of "Harassment of a Biker" (Motorcyclist) as a defense against Trooper Fedorko's reason for stopping him. If note will be taken of the trial transcript, Trooper Fedorko's reason for the stop has been broadened to include speeding.

Appellant's Motion to Vacate

2) Although your petitioner testified to the sequence of events that occurred during the search of his Motorcycle, he failed to cover one point properly that was very vital to his motion; had he been present for the cross-examination of Trooper Fedorko by Mr. Rosen, his recollection would have been refreshed by the reference to Trooper Fedorko's report that was made at the time of arrest. Your petitioner in fact gave the bill of sale to the trooper for the motorcycle before the search along with the valid driver's license. There was no reason a search of the saddlebags be properly based on, in the trooper's hand was the bill of sale, the necessary document to apply for registration; hence, no registration could possibly exist. The only document in the saddlebags was a certificate of warranty for the motorcycle that was brand new.

Because your petitioner was denied his right to confront the witnesses against him, he asks that this Honorable Court will grant the relief he seeks.

Memorandum of Decision

Ruling on § 2255 Motion

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. N-75-112

NORMAN WILCOX

—v.—

UNITED STATES OF AMERICA

Civil No. B-75-160

RICHARD JENKINS

—v.—

UNITED STATES OF AMERICA

Civil No. B-75-161

DONALD HALL

—v.—

UNITED STATES OF AMERICA

Civil No. B-75-190

LYNN ELLEN MORROW

—v.—

UNITED STATES OF AMERICA

Memorandum of Decision

Petitioners' motions, all brought pursuant to 28 U.S.C. § 2255, present the single question whether they were deprived of any rights when they were absent from the courtroom during several days of hearings on pre-trial motions prior to their joint trial on federal bank robbery charges.¹ Petitioners claim, in letters submitted to this Court without the assistance of counsel, that the conduct of the hearings in their absence was in violation of the Sixth Amendment to the United States Constitution and Fed. R. Crim. P. 43, and that they are therefore entitled to new trials.² In response to this Court's order, the Government has responded to each of the petitions by submitting a memorandum of law and affidavits from a number of the persons who were involved in the proceedings now in dispute. The Government has also served interrogatories on three of the petitioners,³ and because it considers the original response in some respects unsatisfactory, has supplemented those interrogatories with a motion to compel responses to certain of the questions. Although the record varies in some minor respects from petitioner to petitioner, the material facts sufficient for a decision are not in dispute, and no hearing is required.

¹ A fifth defendant was also convicted at trial, but the Court granted his motion for a directed judgment of acquittal.

² This issue is now raised for the first time in the course of this long proceeding. No objection was made at or before trial, although the Court issued a written memorandum of decision with respect to the pre-trial motions, and the issue was also not raised on direct appeal. See *United States v. Jenkins*, 496 F.2d 57 (2d Cir. 1974). Even if petitioners' claim had merit, new trials would not be warranted. If the right to be present was not effectively waived, new suppression hearings could be held on any issues requiring the presence of a defendant.

³ The Government did not serve interrogatories on Wilcox.

Memorandum of Decision

All petitioners were tried and convicted of the September 25, 1972, robbery of a branch of the Union Trust Company in Danbury, Connecticut. On March 12, 1973, this Court heard argument on petitioners' motions to dismiss the indictment, and began to take evidence on suppression motions also filed on behalf of petitioners. The suppression hearings were continued on March 13, 16, 26, and 30, and April 10. Each petitioner was at all times represented by separate, court-appointed counsel.

At the conclusion of the argument on the motion to dismiss, the Court asked counsel whether they wanted their clients present in Court for the suppression hearings that were about to begin; all petitioners were then in the Marshal's lockup in the courthouse, except for petitioner Hall, who was free on bond. The record does not reflect Hall's whereabouts. Attorney Thomas Clifford, counsel for petitioner Hall, responded "I have no request"; no other attorney made any response at all. After a brief procedural discussion, the Court began taking evidence on petitioners' motion to suppress evidence seized by the Government on several different occasions.

When Court resumed after lunch on March 12, the Court relayed to counsel a question posed by Chief Deputy United States Marshal Anthony Dirienzo, who wanted to know whether counsel desired their clients to remain in the building, or whether he could return them to their respective jails. Clifford was the first to say that he did not want his client to remain. After a brief discussion, attorney Emil Frankel, petitioner Wilcox's attorney, said that he also did not require his client's presence. Attorney Robert Oliver made a similar concession with respect to his client, petitioner Morrow. Attorney Daniel Sagarin, petitioner Jenkins' counsel, said nothing at all at this

Memorandum of Decision

point. Sagarin has invoked the attorney-client privilege and has declined to respond to the Government's request to disclose his role in the proceedings. The Government, however, has submitted the affidavit of Marshal Dirienzo, who avers that he approached Sagarin on March 12 before Court opened and asked if counsel desired petitioners' presence in Court.

"I recall being advised by him as follows: that he (Attorney Sagarin) doubted it 'strongly' (that they [defense counsel] would want the defendants present in the courtroom during the hearing) as it would give the Government witnesses who were going to identify them (the defendants) a 'pre-view'." [sic]

Dirienzo affidavit, ¶ 5. (All parentheticals in original). The Marshal then informed Sagarin that if counsel wanted the defendants, they should advise him. He says that he did not receive any request from Sagarin or any other attorney to bring any of the petitioners in his custody into the courtroom. In addition, the Government has also submitted the affidavit of attorney Oliver, who remembers at least two conversations among the attorneys, including Sagarin, "to the effect that they did not want their clients present in the courtroom . . . so that the witnesses would not have an opportunity to observe their clients." Oliver affidavit, ¶ 5.

With one exception, the record indicates that no petitioner was again present in the building on any of the days on which suppression hearings were held. The exception is Wilcox, who testified on March 16 concerning

Memorandum of Decision

events surrounding his own arrest, and who asked and was permitted to remain in Court following his testimony.⁴

The final three days of hearings, beginning on March 26, involved motions to suppress photographic identifications on the ground the photo spreads were suggestive. As the hearing began on that day, the prosecutor made the following representation to the Court, with all defense counsel present.

"I have had conversation with defense counsel in this case, and they each stated to me that they did not wish that their clients be present during this hearing. I offered to produce them, and they said they did not want them here.

"So, as far as the Government is concerned none of the defendants have been brought here, at their counsel's request."

Before accepting this decision, the Court ascertained that none of the photo identifications was made in the presence of any defendant.

Wilcox's petition is the most detailed. He disputes none of the material facts stated above, but in the unverified document appears to contend that he was not aware, despite his presence in the building on March 12, that hearings had been held in his absence on March 12

⁴ Wilcox also claims he sent a letter to the Court on March 13 or 14 demanding that he be allowed to be present. No such letter appears in the Court files. In any event, in light of the ground of the present decision, the question of its existence *vel non* is not material.

Memorandum of Decision

and 13. The sworn affidavit of his attorney, Frankel, disputes this. He contends that he conferred with Wilcox prior to the commencement of the first suppression hearing and advised Wilcox "that he should not be in the courtroom during the pre-trial hearings because of the importance of identification testimony and the likelihood that his presence in the courtroom would insure his identification by witnesses." Frankel affidavit, ¶ 6. Frankel also claims Wilcox at no time requested to be present, until he elected to testify on March 16,⁵ and that at no time thereafter did he make any request to be present.

Jenkins presented his motion in the form of a request to join the action commenced by Wilcox. His petition alleges no other specific details, except the claim that he "emphatically requested" of his attorney that he be present at every stage of the proceeding. In his sworn response to the Government's interrogatories, however, Jenkins invoked the attorney-client privilege and refused to answer questions that sought to probe his allegations. He refused to say under oath whether he discussed his not being present with his attorney, and what advice, if any, his attorney had offered with respect to his being present. He also refused in general to waive the privilege, and explicitly denied that he was claiming that his representation had been ineffective.

Hall's petition was limited to requesting permission to join with Wilcox, and he alleges no details at all. In responding to the Government's interrogatories, Hall ad-

⁵ Frankel's fears were justified. Wilcox was identified, when he chose to remain in Court on March 16 after his own testimony, by the Chief of the Danbury Police Department.

Memorandum of Decision

mits that he was out on bond and not in federal custody at the time of the hearings, and in all other respects duplicates Jenkins' responses; he also invokes the attorney-client privilege with respect to questions concerning consultation with his counsel on the advisability of his being present for the hearings, a position to which his attorney has adhered.

Morrow, who was in custody during the hearings, alleges no facts in her petition and has filed interrogatory responses identical to those submitted by Jenkins. Her attorney has also submitted an affidavit; he admits that Morrow was in the courthouse building on March 12 and that she remained in the Marshal's lockup for the entire day.

"At my request Lynn Ellen Morrow was not brought into the courtroom on March 12, 1973, and was not present for any of the evidentiary hearings held on the various pre-trial suppression motions." Oliver affidavit, ¶ 4.

The Government does not dispute the claim that petitioners were in fact absent from the courtroom during the hearings; nor does it dispute the general proposition that petitioners had a right to be present, *e.g.*, *United States v. Clark*, 475 F.2d 240 (2d Cir. 1973); *United States v. Dalli*, 424 F.2d 45 (2d Cir. 1970). See 8A Moore's Federal Practice ¶ 43.03[1]. The Government's sole contention is that, for tactical reasons, each attorney chose to exclude his client from the hearings, and that this decision waived petitioners' right to be present as effectively as if the Court had conducted an on-the-record

Memorandum of Decision

voir dire of each petitioner before acceding to his absence.⁶

There is no question that the right to be present, even during the trial itself, may be waived, *United States v. Tortora*, 464 F.2d 1202, 1208-10 (2d Cir. 1972)⁷ and the

⁶ With respect to the hearings on the photographic identifications made out of petitioners' presence, the Government need not rest on waiver. Neither the Constitution nor Rule 43 assures the right to be present when such presence would be "useless or the benefit but a shadow," *Stein v. United States*, 313 F.2d 518, 522 (9th Cir. 1962), citing *Snyder v. Com. of Mass.*, 291 U.S. 97, 106 (1934). The issue at this segment of the hearing was not related to petitioners' guilt or innocence, compare *United States v. Bell*, 464 F.2d 667, 671 (2d Cir. 1972), and involved no events at which they were present and therefore able to advise their counsel on how to proceed with cross-examination. Cf. *United States v. Gradsky*, 434 F.2d 880 (5th Cir. 1970). Their presence would have served no useful purpose and was therefore not required.

Moreover, it is well settled that Rule 43 is subject to the harmless error provision of Rule 52(a), *United States v. Arriagada*, 451 F.2d 487 (4th Cir. 1971); *United States v. Schor*, 418 F.2d 26, 30 (2d Cir.); *United States v. Compagna*, 146 F.2d 524, 528 (2d Cir. 1945) (L. Hand, J.). See also *United States v. Crutcher*, 405 F.2d 239, 244 text at n. 2 (2d Cir. 1968). For the reasons already expressed, the Court would be prepared to hold that petitioners' absence from this portion of the hearings, assuming an unwaived right to be present, was harmless error beyond a reasonable doubt. See 3 Wright, Federal Practice and Procedure § 721, text at n. 8. The disposition of the case, however, makes it unnecessary to reach this point.

⁷ There is some authority for the proposition that a defendant in custody may never execute such a waiver. See *United States v. Crutcher*, 405 F.2d 239, 243 (2d Cir. 1968). These cases all relate either to events occurring at the trial itself, involving either the impanelling of the jury, *ibid.*; *Cross v. United States*, 325 F.2d 629 (D.C. Cir. 1963), or improper communications between Court and jury, *Evans v. United States*, 284 F.2d 393 (6th Cir. 1960). No Court has ever suggested that this rule, if it is a rule, applies to pre-trial proceedings, and in light of the substantial tactical reasons for counsel to prefer their clients to be absent from such hearings, it would be unwarranted to apply such a rule in these circumstances.

Memorandum of Decision

Court of Appeals for this Circuit appears to assume that in-court statements of the attorney may be sufficient to effect the waiver, *United States v. Crutcher*, *supra*, 405 F.2d at 243, an assumption that there is little reason to question. No court has ever classified the right to be present at a pre-trial suppression hearing as one of those rights so clearly personal that only a personal, on-the-record statement by the defendant himself may suffice to waive it. See *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir. 1973) (*en banc*); *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1111 n. 102.

An attorney⁸ may, without prior consultation with his client, waive the client's right to confront witnesses against him at trial by agreeing to the use at trial of a transcript of testimony taken at pre-trial hearings, *Rodriguez v. Nelson*, 286 F. Supp. 321 (C.D. Cal. 1968); he may also waive the right to grand and petit juries selected without regard to race, *Aaron v. Capps*, 507 F.2d 685 (5th Cir. 1975); *Weems v. United States*, 361 F. Supp. 922 (D. Md. 1973). See also, *Vessels v. Estelle*, 376 F. Supp. 1303, 1308 (S.D. Tex. 1973), *aff'd*, 494 F.2d 1295 (5th Cir. 1974) (waiver of insanity defense). Each of these rights is at least as substantial as the right to be present at a pre-trial hearing not directly concerned with the determination of guilt; if an attorney may waive these rights, there is no reason why he may not waive the right to be present as well.

In *Crutcher*, *supra*, the Court of Appeals intimated in *dictum* that the waiver would be effective only if done

⁸ It of course makes no difference whether the attorney is appointed or retained, *cf. United States v. Marshall*, 488 F.2d 1169 (9th Cir. 1973).

Memorandum of Decision

with the client's knowledge and consent. *Crutcher*, however, involved the impanelling of the jury, a right mentioned specifically in Rule 43, and an event that is part of the trial itself. Moreover, the absence of a defendant from the jury selection process is particularly fraught with prejudice; prospective jurors would be very likely to draw adverse inferences from the failure of a criminal defendant to be present at the jury's selection. Such an opportunity for prejudice, almost unavoidably present at jury selection, simply does not exist at a suppression hearing.

The record in the present case demonstrates with sufficient clarity that each of the attorneys intended that his client not be in the courtroom, and that in each case the ground of decision was to avoid the possibility that the client would be identified from the witness stand by the Government's witnesses. This decision on a matter of trial strategy, made by the person to whom the conduct of the defense is by law confided, see *United States v. Sorrentino*; 175 F.2d 721 (3d Cir. 1949), precludes petitioners from collaterally attacking their convictions on the basis of the attorneys' decision. Cf. *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965).

The affidavits of the defense attorneys and of Marshal Dirienzo, all described above, establish that this tactical reason was the basis for counsels' decision, and the Court's inquiries about counsels' desire for their clients' presence, at times when all counsel were in Court, is an adequate record on which to base the conclusion that all counsel in fact made the choice. The conclusion is additionally supported by the affidavit submitted by the Assistant United States Attorney who was the prosecutor in the case. He

Memorandum of Decision

avers that he repeatedly informed counsel of his intention to seek in-court identifications of any defendant present during the hearings, a claim supported by the representation that he made to the Court at the beginning of the second segment of the hearings, to which no counsel responded.

Accordingly, the motions for relief pursuant to 28 U.S.C. § 2255 are denied.⁹

Dated at Hartford, Connecticut, this 4 day of August, 1975.

/s/ JON O. NEWMAN
JON O. NEWMAN
United States District Judge

⁹ It is unnecessary to decide the Government's motion to compel additional responses to its interrogatories.

EXHIBIT A

Affidavit of Andrew B. Bowman

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. N-75-112

NORMAN WILCOX

—v.—

UNITED STATES OF AMERICA

STATE OF CONNECTICUT

COUNTY OF FAIRFIELD ss.:

Bridgeport, Connecticut, May 28, 1975

ANDREW B. BOWMAN, being duly sworn, does depose and say:

1. At the time of this affidavit I am an attorney at law practicing in the city of Bridgeport, and was formerly an Assistant United States Attorney for the District of Connecticut.

2. That during the period of time that I held a position of Assistant United States Attorney I prosecuted and directed the investigation of the case known as *United States v. Norman Wilcox, et al*, a federal bank robbery case, the subject matter of which was the September 12, 1972, armed robbery of a federally insured bank.

3. From the time that counsel appeared in the case I maintained an open file policy.

EXHIBIT A—Affidavit of Andrew B. Bowman

4. Prior to the start of the hearing it was determined that evidence would be heard regarding the validity of the searches and seizures which took place on the day of and the day following the robbery in the vicinity of 42A Virginia Avenue, Danbury, Connecticut, by Danbury police officers and F.B.I. agents.

5. On March 12, 1973, hearings were commenced on the defendants' motions to suppress evidence. At the March 12 hearing I had subpoenaed the following people to testify in the hearing to be held at the United States Courthouse at New Haven, Connecticut: Chief James P. Tallon, Sgt. Valentine Coelbo, Mrs. Francis Gary, John Blakeney, Sgt. Joseph Tierney. Special Agents Robert O'Neil and Donald Batt of the F.B.I. were also present. The foregoing individuals would be testifying as to individuals present at 42A Virginia Avenue, Danbury, Connecticut, and events that took place in and around that location on the day of the robbery and the day subsequent to the robbery.

6. I informed defense counsel that if their clients were present in the courtroom during the course of the testimony of the federal and state agents that I would be asking for in court identifications of their clients.

7. Throughout my discussions with all defense counsel I informed them that it was my intention, in support of the government's theory, to place the defendants together in Danbury both right before and right after the bank robbery. Therefore, I kept them constantly informed as to which witnesses would be called on by me to make an in court identification of a particular defendant.

EXHIBIT A—Affidavit of Andrew B. Bowman

8. Subsequently, during the course of the hearing on March 12, 1973, the defendants were not brought into the courtroom although all defendants in custody were present in the United States Courthouse at New Haven, Connecticut. All defendants in custody remained in the United States Marshal's "lockup".

9. On March 16, 1973, Norman Laverne Wilcox was present for the continuation of the motion to suppress and was present in the courtroom. He was promptly identified by Chief Tallon as being present at 42A Virginia Avenue, Danbury, Connecticut, on the day that the robbery took place.

10. On March 26, 1973, the motions to suppress identification testimony commenced and in open court I advised the court that defense counsel had stated to me that they did not wish their clients to be present during this hearing. In accordance with the wishes of defense counsel, their clients were not present during the motions to suppress identification testimony.

.....
ANDREW B. BOWMAN

Subscribed and sworn to before
me this day of May 1975.

.....
COMMISSIONER OF THE SUPERIOR COURT

EXHIBIT C

Affidavit of Emil Frankel

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. N-75-112

NORMAN WILCOX

—v.—

UNITED STATES OF AMERICA

STATE OF NEW YORK

COUNTY OF NASSAU ss.

Hempstead, N.Y. May 29, 1975

EMIL FRANKEL, being duly sworn, does depose and say:

1. I am an attorney at law and formerly practiced law in the city of Stamford, Connecticut, with the law firm of Wofsey, Rosen, Kweskin & Kuriansky.

2. I was appointed under the Criminal Justice Act to defend Norman Laverne Wilcox in Criminal No. B-63 which was consolidated with United States v. Lynn Ellen Morrow, Criminal No. 13,225.

3. Norman Laverne Wilcox was in the custody of the United States Marshal for the District of Connecticut at the commencement of the pre-trial suppression motions which began on March 12, 1973.

EXHIBIT C—Affidavit of Emil Frankel

4. Norman Laverne Wilcox was present at the Courthouse, New Haven, Connecticut, on March 12, 1973, but remained in the Marshal's "lockup".

5. I conferred with Norman Laverne Wilcox at the United States Courthouse in New Haven, Connecticut, prior to the commencement of the first suppression hearing.

6. I advised Norman Laverne Wilcox that he should not be in the courtroom during the pre-trial hearings because of the importance of identification testimony and the likelihood that his presence in the courtroom would insure his identification by witnesses.

7. Although we discussed his not being present in the courtroom, Norman Laverne Wilcox did not specifically request to be present during the same suppression hearing. Had he done so, he would have been present.

8. During subsequent discussions concerning his defense Norman Laverne Wilcox elected to testify to the events surrounding his arrest in the state of New Jersey by a New Jersey State Trooper. Norman Laverne Wilcox was brought to the Courthouse on March 16, 1973, and was present during the testimony of James P. Tallon, Chief of Police, Danbury Police Department, and Chief Tallon identified Norman Laverne Wilcox in the courtroom at page 235 of the transcript of the pre-trial motions.

9. Norman Laverne Wilcox remained in the courtroom for the rest of the proceedings on March 16, 1973, as he requested to do so, and this was reflected at page 338 of the transcript of the pre-trial motions.

EXHIBIT C—Affidavit of Emil Frankel

10. Norman Laverne Wilcox was not present for subsequent pre-trial motions to suppress which involved the defendants' attempt to suppress photographic identifications. His nonpresence at this time was based upon the likelihood that his presence in the courtroom would insure his identification by the witnesses that testified.

11. At no time during the pre-trial hearings was Norman Laverne Wilcox denied a request to be present in the courtroom.

12. To the best of my knowledge and recollection, at all times other than March 16, 1973, when Norman Laverne Wilcox and I agreed that he should testify, we discussed and he accepted my advice that he not be present in the courtroom. That advice was based on my opinion that having any of the defendants present in the courtroom during the pre-trial suppression motions would undoubtedly lead to their being identified in the courtroom. It was felt that tactically and strategically it was in the best interest of my client that he not be present in the courtroom during the pre-trial suppression motions.

/s/ EMIL FRANKEL
EMIL FRANKEL

Subscribed and sworn to before
me this 29th day of May, 1975.

/s/ GERALD N. GOLDBERG
GERALD N. GOLDBERG
Notary Public, State of New York
No. 31-6558320
Qualified in New York County
Commission Expires March 30, 1976

EXHIBIT D

Affidavit of Robert G. Oliver

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. N-75-112

NORMAN WILCOX

—v.—

UNITED STATES OF AMERICA

STATE OF CONNECTICUT

COUNTY OF NEW HAVEN ss.

New Haven, Connecticut, May 22, 1975

ROBERT G. OLIVER, being duly sworn, does depose and say:

1. I am an attorney at law and have been admitted to practice before the Bar of the State of Connecticut and of this Court since 1965.

2. I was appointed under the Criminal Justice Act to defend Lynn Ellen Morrow in Criminal No. 13225 (and certain companion cases). Criminal No. 13225 was, over my objection, consolidated with Criminal No. B-63, United States v. Wilcox, Bailey, Hall and Jenkins.

3. Lynn Ellen Morrow was in the custody of the United States Marshal at the commencement of pre-trial suppression motions on March 12, 1973, and was present at the Federal courthouse at New Haven in March 12, 1973, but remained in the Marshal's "lockup".

EXHIBIT D—Affidavit of Robert G. Oliver

4. At my request Lynn Ellen Morrow was not brought into the courtroom on March 12, 1973, and was not present for any of the evidentiary hearings held on the various pre-trial suppression motions.

5. I recall at least two conversations by attorneys for the other defendants, Wilcox, Bailey, Hall and Jenkins, to the effect that they did not want their clients present in the courtroom during the several suppression hearings so that the witnesses would not have an opportunity to observe their clients.

6. My recollection is that, in fact, none of the other defendants were present in court during the suppression hearings except Wilcox on the day he testified concerning his arrest in New Jersey.

/s/ ROBERT G. OLIVER
ROBERT G. OLIVER

Subscribed and sworn to before me on this 27th day of May, 1975.

/s/ CAROL A. KANE
Notary Public

EXHIBIT B

Affidavit of Anthony Dirienzo

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. N-75-112

NORMAN LAVERNE WILCOX

—v.—

UNITED STATES OF AMERICA

STATE OF CONNECTICUT
COUNTY OF NEW HAVEN ss.

New Haven, May 28, 1975

ANTHONY DIRIENZO, being duly sworn, deposes and says:

1. Prior to March of 1973, up to and including the date of this affidavit I have been Chief Deputy United States Marshal for the District of Connecticut.

2. One of the duties of my office is the care, custody and control of defendants in criminal cases pending in the District of Connecticut who are otherwise not at liberty.

3. On March 12, 1973, I caused Norman Laverne Wilcox, James Bailey, Richard Jenkins and Lynn Ellen Morrow to be brought to the United States Court House at New Haven, Connecticut because of a hearing that

EXHIBIT B—Affidavit of Anthony Dirienzo

was scheduled to take place on that date. Donald Hall was not in my custody at that time as he was at liberty. All of the aforesaid individuals were defendants in Criminal No. B-63 and 13,225.

4. On March 12, 1973, Norman Laverne Wilcox, James Bailey, Richard Jenkins and Lynn Ellen Morrow after being brought to the United States Court House at New Haven, Connecticut remained in the Marshal's "lockup" and were not brought into the courtroom.

5. At some point in time the defendants mentioned in paragraph 4 arrived at the United States Court House at New Haven, Connecticut. I approached Attorney J. Daniel Sagarin, who was one of the defense counsel in the case, and asked him if they (he and his co-defense counsel) wanted the defendants present in the courtroom at the hearing on the motion to suppress. I recall being advised by him as follows: that he (Attorney Sagarin) doubted it "strongly" (that they [defense counsel] would want the defendants present in the courtroom during the hearing) as it would give the Government witnesses who were going to identify them (the defendants) a "preview".

I then advised Mr. Sagarin that if they (defense counsel) wanted the defendants in the courtroom to so advise me. I did not receive any request from any of the defense counsel to bring any of the defendants in my custody into the courtroom on March 12, 1973.

6. On March 12, 1973 after the luncheon recess, I inquired of Judge Newman whether I could return the defendants who were in custody to their respective jails. I recall Judge Newman asking defense counsel if the presence of the defendants (in the "lockup") was re-

EXHIBIT B—Affidavit of Anthony Dirienzo

quired for the rest of the afternoon. After a short period of time I was advised that I could return the defendants in my custody to their respective jails.

7. On March 16, 1973, I caused defendant Norman Laverne Wilcox to be brought to the United States Court House at New Haven, Connecticut for a hearing on a motion to suppress.

8. Other than March 12, 1973 and March 16, 1973, defendants Norman Laverne Wilcox, James Bailey, Richard Jenkins and Lynn Ellen Morrow were not brought to the United States Court House at New Haven, Connecticut for any of the pre-trial motions to suppress.

.....
ANTHONY DIRIENZO

Subscribed and sworn to before
me this day of May, 1975.

.....
Commissioner of the Superior Court

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 76-2097

NORMAN WILCOX,
Appellant,

v.

U S A,
Appellee

AFFIDAVIT OF SERVICE BY MAIL

Patricia D. O'Hara, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 51 West 70th Street,
New York, New York 10023

That on the 29th day of November, 1976, deponent served the within Brief for the Appellee
upon Norman Wilcox, P.O. Box 1000, Federal Correctional Institution,
Lewisburg, PA. 17837

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Patricia D. O'Hara
Sworn to before me,

This 29th day of November 1976

Edward A. Quimby
EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977